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SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CI/3038/2000

Starred Decision No: 55/01

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Mr Damien Abbott,
Office of the Social Security and Child Support Commissioners,
5th Floor, Newspaper House, 8-16 Great New Street, London EC4A 3BN.

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Commissioners' case no: CI 3038 2000

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1 I allow the appeal.

2 The appeal by the claimant is against the decision of the Nottingham appeal tribunal on 8 October 1999. It was brought with permission from the chairman. The decision of the tribunal was that the decision of the Secretary of State is confirmed. The Secretary of State decided that the claimant was not incapable of following his regular occupation as a result of the relevant loss of faculty.

3 For the reasons below, the decision of the tribunal is wrong in law. I set it aside. The appeal is referred to a new tribunal for rehearing. That tribunal is to consist of members who were not members of any previous tribunal involved in this appeal. The tribunal is to reconsider the case in accordance with this decision.

Background to the appeal

4 The claimant suffers from prescribed disease A11 (commonly known as vibration white finger). The date of onset was 1 January 1987 and disablement was assessed at 5 per cent from and including 16 April 1987 for life. That is not in dispute. The claimant claimed reduced earnings allowance on 20 May 1998. He had been a miner until September 1997, then became an operative for another employer. The adjudication officer decided that while he was incapable of following his regular occupation as a miner, this was not due to the relevant loss of faculty. The claim for the allowance was refused.

5 The claimant appealed to the tribunal, quoting the *Adjudication Officer's Guide* (paragraph 85378) about prescribed disease A11:

> "claimants with this disease should ... be regarded as incapable of their regular occupation, even if their reasons for leaving are unconnected with the relevant loss of faculty".

The appeal also referred to Commissioner's decision CI 15803 1996, where the deputy Commissioner accepted that reported decision R(I) 2/81 and paragraph 85738 are "together" authoritative "for the proposition that claimants with A11 should be regarded as incapable of their regular occupation even if they left for unconnected reasons, since the condition of vibration white finger is a degenerative one which will not improve once contracted". The representative also included a copy of the adjudication officer's submission to the Commissioner in CI 15803 1996. As the deputy Commissioner made no reference to that submission in his decision, it is irrelevant and should not have been cited.

The tribunal decision

6 The tribunal held an oral hearing. The relevant part of its statement of facts and reasons is:

"It is apparent from what we have heard today that the appellant has a minimal loss of faculty attributable to prescribed disease A11 and has not in fact been incapable of following his regular occupation for all the period we have mentioned above [the period to September 1997 when the claimant left coalmining]. We do not find we have any evidence before us to convince us that he is in fact incapable of following his regular occupation at the present time. The appellant told the tribunal that if the pit at which he worked had not closed, he would have continued to work there. We were told that the claimant did not lose time from work because of prescribed disease A11. We have no evidence before us today of deterioration of the claimant's condition relating to A11 and none has been presented and no application to increase his 5% life assessment for this condition has been sought under the rules applicable for unforeseen aggravation ... It has appeared to the tribunal from what we heard, and taking account of the minimal loss of faculty stemming from PDA11 that the appellant has not been incapable of following his regular occupation as a result of the relevant loss of faculty, and we consider the facts of this case to be very different from those indicated in the Commissioner's decision referred to above [CI 15803 1996]..."

Grounds of appeal

7 For the claimant, it was argued that the tribunal had erred in law by failing to consider the conditions of Schedule 7, paragraph 11,to the Social Security Contributions and Benefits Act 1992 "step by step". The representative also argued:

"The permanent condition of vibration white finger is an accepted fact. If the Chief Medical Officer of the BAMS issues guidance to this effect and the Central Adjudication Services subsequently issue the same guidance to the then Adjudication Officers (now Decision Makers) then [the claimant] is entitled to expect these guides be followed."

This argument was, in effect, that the tribunal should have followed CI 15803 1996 as it covered the exact point in this decision. The chairman endorsed a grant of leave against these grounds, noting that there were a large number of appeals raising similar points.

8 The submission from the Secretary of State's representative supported the appeal because the tribunal had failed to make adequate findings of fact. The point at issue was whether the claimant's incapacity to follow his regular occupation was as a result of the relevant loss of faculty. The Secretary of State's representative submitted that the tribunal decided against the claimant on the claimant's own evidence that he continued working in the mine until September 1997, and that he would not have left the mine if he had not been made redundant then. He submitted that this was too narrow a basis for deciding the question, that the tribunal had not made findings of fact about the wider context of the question, namely any future damage to the claimant or risk to others, and that it had failed adequately to explain its decision.

The test to be applied

9 The relevant part of paragraph 11(1) of Schedule 7 to the Social Security Contributions and Benefits Act 1992 (reduced earnings allowance) is:

> "An employed earner shall be entitled to reduced earnings allowance if ... disablement is assessed at not less than 1 per cent ... and ... as a result of the relevant loss of faculty, he is ... incapable and likely to remain permanently incapable, of following his regular occupation ..."

Applying the test

10 That test raises questions of fact, subject to proper interpretation of the legislation. The relevant loss of faculty is that found in assessing the claim for disablement benefit: R(I) 7/64. It is not disputed that the claimant has prescribed disease A11 with disablement assessed for life at not less than 1 per cent. The relevant loss of faculty was described as "episodic blanching of hands" (documents 35 and 37). It is not disputed that the regular occupation of the claimant was as a coalface worker in the mines (although the tribunal makes no finding of fact about this).

11 On the question of causation ("as a result of..."), the claimant stated to the medical authorities that he was unable to fulfill the requirements of his regular occupation because he was unable to use power tools. The reason he gave was that further exposure would result in deterioration in the condition of his hands (document 37). The adjudicating medical authority was asked the following standard questions in the report form (the answers are in inverted commas):

> Is the customer capable of their regular occupation? "No"
> Does the loss of faculty ... contribute materially to their incapacity for their regular occupation? "No"
> Please give your reasons and say what other conditions prevent the customer following their regular occupation. "The vascularity of both hands were normal today - with good capillary refill".

The form of those questions reflects decisions by Commissioners in such cases as R(I) 29/51. Had the adjudicating medical authority properly and adequately answered those questions, then there would be a firm foundation for the decision before the tribunal. But the reason given by the adjudicating medical authority, in my view, is totally inadequate. The fact that blanching did not occur on that particular day is not relevant to the claimant's continuing capacity to work in his regular occupation (as against its relevance to determining the underlying issue of diagnosis). It is not a reason for the answers given by the adjudicating medical authority. No other reasons are stated. There is also no attempt to answer the point about future risk made by the claimant to, and recorded by, the adjudicating medical authority. Neither the Secretary of State, in the reconsideration, nor the Secretary of State's representative, in the submission to the tribunal, deal with this defect in the adjudicating medical authority's decision.

12 Did the tribunal adequately answer these questions? If it did, then that could make good the earlier errors. It did not. Its answer to the first question was "No". Its reason, extracted from the passage quoted above, is: "we do not find we have any evidence before us to convince us that he is in fact incapable of following his regular occupation at the present time." But it did have such evidence in both the claimant's statement that if he had continued as a coalface worker his condition would have worsened and the more

general proposition that this was the normal course of that disease. The claimant, when asked this, gave an entirely appropriate answer: if I continue at this work, my hands will get worse. That is the point made in paragraph 85378 in the *Adjudication Officers' Guide*. Despite the point being clearly in issue before it, the tribunal failed to deal with it.

13 I agree with the submissions that the tribunal did not make all the necessary findings of fact to decide if the claimant was capable of continuing his regular occupation, because it did not look to the future as well as the present and past. It had evidence that, in the assumed circumstance that the claimant were to return to work as a coalface worker, then without any other change of circumstances his condition was likely to get worse, and it did not consider it. It therefore failed to make good the failures of the adjudicating medical authority and Secretary of State to deal with the issue. It also applied the wrong burden of proof. The task of the claimant was not to convince the tribunal (which implies a high standard of proof) but to show the tribunal that on the balance of probabilities the prescribed disease materially contributed to an incapacity to continue the regular occupation. For these reasons, I set aside the decision of the tribunal and refer the matter to a new tribunal.

The general guidance

14 The argument for the claimant also puts the issue in another way, which I must consider in order to direct the new tribunal. Prescribed disease A11 is degenerative. Once he or she has contracted it, a claimant's condition will not improve. The statement to that effect in paragraph 85738 of the Guide is a medical fact. The Guide adds, "Claimants with this disease should therefore be regarded as incapable of their regular occupation." That is not a statement of law or fact, but guidance as to the approach to be adopted following from the previous statement. It contains hidden assumptions. One is that prescribed disease A11 can only be prescribed when the disease has reached a level of intensity sufficient to meet the statutory test. As in this case, once the disease is prescribable it seems commonly to be assessed at levels of disablement ranging between 4% and 10% from the date of prescription. In other words, to be prescribed, the condition must not only have been contracted, but will be over 1% disablement. The adjudication officer 's submission to the tribunal in CI 15803 1996 used the phrase "considerably damaged" to make the same point. To term that as "minimal", as the tribunal did in this case, is to understate it in the context of a degenerative disease where there is going to be a life award. "Minimal" in this context can only usefully mean less than 1%.

15 The *Guide* then suggests assuming that once the level of degeneration is reached, a person suffering from it should not be expected to continue in the regular occupation. This is based on an analogy with Commissioner's decision R(I) 2/81 dealing with the degenerative disease of occupational deafness. The proposition of law from R(I) 2/81, as I understand it, is that it is not erroneous in law to conclude that a person suffering a degenerative disease caused by continued exposure in a regular occupation, and now of a sufficient intensity to be prescribed, may be found to be incapable of remaining in that occupation because of the totality of risks of the continued exposure to the claimant and others. In other words, future injury and risk are relevant factors in the decision about continuing in a regular occupation if the circumstances warrant it. Whether the

circumstances warrant it in a particular case is, nonetheless, a question of fact. The error of the tribunal in this case was that it failed to consider whether those factors were relevant.

CI 15803 1996

16 The claimant's argument is, in substance, that CI 158093 1996 has turned the issue of future risk and injury into a question of law, at least for prescribed disease A11. The claimant argues that this is not permissive but mandatory – the claimant *must* be regarded as incapable of his regular occupation. The deputy Commissioner in CI 15803 1996 relies on R (I) 2/81 and the paragraph of guidance to conclude that those suffering from A11 "should be regarded as incapable of their regular occupation" (paragraph 3). Reading that decision as if "should" means "must", the submission is that there is a general rule of law that tribunals *must in all cases*, regardless of the full evidence, assume that a claimant with prescribed disease A11 cannot continue his regular occupation. I disagree. In my view, there is no such rule of law. The law requires that the matter be considered, and no more. It may be a sensible medical and administrative assumption that a claimant cannot continue, and it may apply in many cases, but it remains a question of fact. No such rule can be deduced from R (I) 2/81.

Was the general guidance binding?

17 The claimant has a further alternative argument: the adjudication officer and tribunal should have followed the official guidance. This raises much wider issues about the status of the *Guide*. It can be raised in two possible ways: as a statement of the law and as a statement of intent on which a claimant could rely. Commissioners, relying on decisions of the higher courts, have repeatedly rejected any attempt to use official guidance or leaflets as a basis for interpreting the law (see for example R(SB) 28/84 paragraph 7, R(FC) 1/91 paragraph 39, and CSB 73 1986, where the Commissioner emphasised that tribunals should not use such an approach). I respectfully agree with all those opinions, and reaffirm that this approach applies both to the *Adjudication Officers' Guide* and the *Decision Maker's Guide*. If CI 15803 1996 is indicating otherwise, then it is wrong.

18 The other possible basis for the representative's argument is legitimate expectation. This may apply where statutory authorities indicate clearly that they will act in a certain way when a specific issue arises, and where claimants can show personal detriment in relying on those indications: see for example the decision of the Court of Appeal in *R v Inland Revenue Commissioners, ex parte Unilever* [1996] Simons Tax Cases 681. But such arguments do not arise here for several reasons. First, the *Guide* did not bind adjudication officers or adjudicating medical authorities, who were independent officers. (A different argument might apply to the *Decision Maker's Guide*, but only if it can be established that the guidance is sufficiently clear, unambiguous and unqualified: *R v IRC, ex parte MFK Underwriting Agencies Ltd* [1990] 1 WLR 1545). Second, the *Guide* did not bind the tribunal, which had the duty to consider the matter afresh. Third, there is no evidence that the claimant relied on, and acted to his detriment on, that guidance in this case, or even that he was aware of the guidance when he made his claim. Fourth, the point did not arise as part of the tribunal 's decision in this case, as the tribunal's error was that it did not consider future risk or injury at all.

19 The result is that there are important facts undetermined in this case, namely whether this claimant is at sufficient risk to himself or others if he were to continue with his regular occupation that he is as a matter of fact to be regarded as incapable of following his regular occupation. The tribunal should have in mind not only the factors that were considered by the previous tribunal, but also the probable (if still uncertain) consequences to himself and others of continued work exposure as a coalface worker on the basis of the known general facts about this disease and all the specific evidence. These necessary findings are better made by a tribunal including a medical member, and I do not therefore consider it expedient to make them myself, with or without further evidence.

David Williams
Commissioner

9 April 2001